Altco Jaya Sdn Bhd v Lee Cheng Fong

COURT OF APPEAL (BRUNEI DARUSSALAM) — CIVIL APPEAL NO 16 OF 2008
POWER PCA, MORTIMER AND DAVIES JJCA
16 MAY 2009

Contract — Agency — Claim for commission payable — Commission, nature of — Whether agent had principal's authority to enter into contract — Whether principal bound to ratify contract entered into by agent

The plaintiff alleged that he was an authorised agent for a company named Sari that was awarded a PWD contract. The plaintiff and defendant thereafter agreed that the defendant would pay the plaintiff $B40,000 in exchange for being awarded a subcontract under the contract. The plaintiff alleged that the defendant had failed to pay the $B40,000 after having accepted the subcontract. The defendant alleged that it did enter into a subcontract with Sari. Although the agreement was described as a subcontract agreement, its effect was to assign Sari's contract with PWD to the defendant in consideration of $B50,000 — described as a commission — paid by the defendant to Sari. The plaintiff sued the defendant in the magistrates' court. The magistrate dismissed the plaintiff's claim and gave judgment for the defendant. On appeal by the plaintiff to the High Court, the court allowed the appeal and gave judgment to the plaintiff. The defendant thus appealed to the Court of Appeal. The defendant's main submission was that if a contract was made by the plaintiff with the defendant, it was purportedly made by the plaintiff as Sari's agent; and that consequently the money was payable to Sari, not the plaintiff.

Held, allowing the appeal with costs here and below:

(1) From the evidence, it was clear that the defendant reasonably understood that Sari, through the plaintiff was offering to assign the benefit of the contract to the defendant for $B40,000 (see para 35).

(2) A 'commission', in the ordinary course, is payable by a principal to his agent. However, it was not inappropriate to describe the payment made under the subcontract between the defendant and Sari as a commission; that is, a fee of $B50,000 for passing on to the defendant the project secured by Sari under its contract with PWD. It was also not inappropriate to describe a payment under a contract of a similar kind between the plaintiff and the defendant; that is a payment of $B40,000 for passing on to the defendant a project expected to be secured by contract with PWD. The use of the term 'commission' did not render

it unlikely that the contract purportedly entered into between the plaintiff and defendant was intended by the parties to be of this kind (see para 41).

(3) The agreement purportedly made between the plaintiff and the defendant could only be understood rationally as an agreement made on the mutual assumption that the plaintiff was Sari's agent and was making an agreement on Sari's behalf that Sari would, in effect, pass on to the defendant the benefit of the contract which it was about to make with PWD in consideration of the defendant paying $B40,000 to Sari. However, because the plaintiff did not have Sari's authority to make such an agreement, it did not bind Sari and, unsurprisingly, when it came to know about the purported contract, Sari did not ratify it (see para 42).

[Bahasa Malaysia summary

Plaintif mendakwa bahawa dia merupakan seorang agen yang diberi kuasa oleh sebuah syarikat bernama Sari yang telah diawardkan dengan kontrak PWD. Plaintif dan defendan kemudiannya telah bersetuju bahawa defendan akan membayar kepada plaintif $B40,000 sebagai balasan kerana telah diawardkan dengan subkontrak di bawah kontrak tersebut. Plaintif mendakwa bahawa defendan gagal untuk membayar $B40,000 setelah menerima subkontak itu. Defendan berhujah bahawa ia telah memasuki satu subkontrak dengan Sari. Meskipun perjanjian tersebut digambarkan sebagai satu perjanjian subkontrak, kesan perjanjian tersebut adalah untuk menyerahkan kontrak Sari dengan PWD kepada defendan dengan balasan $B50,000 — yang disifatkan sebagai komisyen — dibayar oleh defendan kepada Sari. Plaintif telah menyaman defendan di mahkamah majistret. Majistret telah menolak tuntutan plaintif dan memberi penghakiman memihak kepada defendan. Semasa rayuan plaintif di Mahkamah Tinggi, mahkamah membenarkan rayuan dan memberi penghakiman memihak kepada plaintif. Defendan dengan itu telah merayu ke Mahkamah Rayuan. Hujah utama defendan adalah sekiranya kontrak telah dibuat oleh plaintif dengan defendan, ia boleh dikatakan telah dibuat oleh plaintif sebagai agen Sari, dan berikutan itu, wang tersebut seharusnya dibayar kepada Sari, dan bukan kepada plaintif.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Daripada keterangan, jelas bahawa defendan sewajarnya telah memahami bahawa Sari, melalui plaintif telah menawarkan untuk menyerahkan faedah kontrak tersebut kepada defendan untuk $B40,000 (lihat perenggan 35).

(2) 'Commission', dalam urusan biasa, dibayar oleh seorang prinsipal kepada agennya. Walau bagaimanapun, adalah bersesuaian untuk menyifatkan bayaran yang dibuat di bawah subkontrak antara defendan dan Sari sebagai komisyen; iaitu fi sebanyak $B50,000 kerana menyerahkan kepada defendan projek yang telah dijamin oleh Sari di bawah kontraknya dengan PWD. Ia juga adalah bersesuaian untuk menyifatkan satu bayaran di bawah satu kontrak yang sama antara plaintif dan defendan; iaitu bayaran sebanyak $B40,000 kerana menyerahkan kepada defendan projek yang dijangka akan dijamin oleh kontrak dengan PWD. Penggunaan terma 'commission' tidak semestinya bermaksud kontrak yang dikatakan telah dimasuki oleh plaintif dan defendan dihasratkan oleh pihak-pihak tersebut untuk bersifat sedemikian (lihat perenggan 41).

(3) Perjanjian yang dikatakan telah dibuat di antara plaintif dan defendan boleh difahamkan dengan rasional sebagai perjanjian yang dibuat atas anggapan bersama bahawa plaintif adalah ejen kepada Sari dan ia telah membuat perjanjian tersebut bagi pihak Sari dan kesan daripada itu, Sari akan menyerahkan kepada defendan faedah daripada kontrak yang mana akan dibuat dengan PWD atas balasan membayar $B40,000 kepada Sari. Walau bagaimanapun, oleh kerana plaintif tidak diberi kuasa oleh Sari untuk membuat perjanjian tersebut, ia tidak mengikat Sari dan tidak menghairankan, apabila ia mengetahui tentang kontrak tersebut, Sari tidak meratifikasikannya (lihat perenggan 42).]

Notes

For cases on agency generally, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2443–2465.

Legislation referred to

Contracts Act (Cap 106) [BR] s 149

Elaiza Merican (Abrahams, Davidson & Co) for the appellant.
Respondent in person.

Davies JCA:

[1] This is an appeal from a judgment of the High Court given on 13 August 2008. The judgment was for the respondent/plaintiff ('the plaintiff') in the sum of $40,000 together with interest and costs. The judgment was given on appeal from the magistrates' court, the High Court reversing the decision of the magistrates' court.

[2] The plaintiff had sued the appellant/defendant ('the defendant') in the magistrates' court for $40,000. He claimed that the plaintiff was an

A authorised agent of Sari Comraya Sdn Bhd ('Sari'); that Sari was to be and was subsequently awarded a government contract for operation and maintenance work upon a water treatment plant at Temburong; that the plaintiff and the defendant agreed that the defendant would pay the plaintiff $40,000 in exchange for being offered a subcontract for the work the subject B of that contract; that the defendant was offered a subcontract for that work, accepted such offer and commenced to perform such contract; and that the defendant nevertheless failed to pay the plaintiff $40,000 or any part thereof.

C **[3]** In the magistrates' court the defendant contended that it was offered a subcontract by the plaintiff purporting to act as authorised agent of Sari; that the plaintiff did not ask the defendant to pay him $40,000 for his remuneration; that the defendant then ceased communicating with the plaintiff; and that the defendant did subsequently enter into a subcontract with Sari and commenced to perform that subcontract.

D

[4] The magistrate held that there was a contract made between the plaintiff and the defendant in which the defendant agreed to pay the sum of $40,000 but held that certain preconditions to payment were not met by the E plaintiff. More importantly for present purposes, the magistrate held that the contract was to pay Sari, not the plaintiff, the sum of $40,000. He accordingly dismissed the plaintiffs claim and gave judgment for the defendant.

F **[5]** Unfortunately the magistrate did not give reasons for coming to the conclusion which he did. It is fortunate, in those circumstances, that there is little material difference between the evidence of the parties about what was said and done and that, consequently, the learned High Court judge and this court were and are in as good a position as the magistrate was to draw G inferences from that evidence.

[6] On appeal to the High Court, the court held that the defendant orally agreed to pay the plaintiff $40,000 if the subcontract was awarded to it by Sari; that there was some talk of conditions attached to the defendant's H obligation to pay the said sum but that, because this was not pleaded by the defendant, it should not be taken into account; that in any event, because the defendant entered into and commenced to perform the subcontract with Sari, any conditions may be presumed to have been fulfilled; that the defendant was awarded the subcontract with Sari; and that the agreement I between the parties was made by the plaintiff personally, not on behalf of Sari. The High Court therefore allowed the appeal and gave judgment for the plaintiff.

[7] The defendant's principal contention in this court is that if a contract

was made by the plaintiff with the defendant, it was purportedly made by the plaintiff as Sari's agent; and that consequently the money was payable to Sari, not the plaintiff. In other words, the defendant seeks to support the judgment and reasons of the magistrate.

[8] It is common ground in this case that, some time in 2004, probably in August or September, the plaintiff had several meetings with the defendant's representative, Hj Afflon. What was said at those meetings, and consequently what, if anything, was agreed between the parties, can best be determined by analysing the evidence of the witnesses who gave evidence about those meetings, in the light of other objective evidence, including a letter, apparently on the letterhead of Sari, dated 5 July 2004, which appeared to authorise the plaintiff to act on behalf of Sari. There were, it now appears, a number of peculiarities about that letter which should cause one to doubt whether, as its terms indicated, the plaintiff was authorised to act on behalf of Sari in discussions and any agreement with the defendant.

[9] In the first place, the address shown on the letterhead of the letter was the plaintiffs residential address not the registered office address of Sari. The plaintiff was cross-examined about this and said that he was authorised by Hj Jamil, the husband of Hjh Sari, one of the shareholders of Sari, to prepare a letter in that form with that letterhead.

[10] Secondly, the plaintiff said that this letter was signed by Hjh Sari. The company return of Sari dated 7 April 2004 shows that Hjh Sari was, indeed, a shareholder of Sari, holding 45,000 shares. However it also showed that the other shareholder, Yoon Siew Poon, held 105,000 shares. The company return was signed by Mr Poon as shareholder and other company records show that Mr Poon was chairman.

[11] Mr Poon gave evidence in this case. He said that the plaintiff had no authority, at any time, to act on behalf of Sari and the plaintiff, who cross-examined Mr Poon, did not question him about this. Mr Poon also said that the chop or letterhead on that letter was not that of Sari. Again the plaintiff did not cross-examine him about that.

[12] We would conclude from this that, notwithstanding the terms of the letter of 5 July 2004, the plaintiff had no authority to approach the defendant on behalf of Sari or to make any agreement with the defendant on Sari's behalf. On the other hand, it is difficult to see what reason the plaintiff would have had in coming to the meetings with Hj Afflon armed with the letter of 5 July 2004 and providing it to Hj Afflon, as he did at one of those meetings, other than to convince the latter that he had authority from Sari to negotiate

A and make an agreement on its behalf. Indeed it appears to have been the plaintiffs evidence throughout that he had such authority.

[13] With that in mind, we turn to the evidence of the plaintiff, his witness Mr Gopal and Hj Afflon, all of whom gave evidence about the meetings at which the plaintiff contends the agreement entitling him to commission was made.

[14] The plaintiff said in his evidence in chief:

> I had an acknowledgement from PWD that I, Mr Lim and Gopal Ramesh had been given a project of water treatment at Temburong.
>
> Altco Jaya is a specialist in this field for purification of water in this country. That is why we approached them to do the job for us and in return they will give us $40,000 in return as commission. Several meetings held in Altco Jaya office. The director Mr Afflon said that they could do the job without obstacle. Letter of Award issued on 4/12 2004 by PWD and receiving the letter, I forwarded the letter to defendant's company and told them to do the work in 14 days.
>
> Mr Afflon told me that they could not start work within 14 days because application of labour quota not approved and not sufficient foreign workers and hence couldn't do any work, so we thought PWD was going to take back the award.

[15] That was the whole of the plaintiff's evidence in chief about those meetings.

[16] When asked in cross-examination whether he, Ah Loong (Mr Lim) and Mr Gopal had secured the project he answered:

> We worked together and I am the leader because I did the counting and the other two provided the financing. We got the information, the tender documents and the letter of award being issued. We had successfully secured the project.
>
> So the project belongs to the three of you?
>
> It belongs to us but Altco Jaya is a specialist so we had to subcontract the work to them.

[17] When asked when he first approached the defendant, he said:

> I think August or July 2004. Subsequent meeting in September.

[18] When asked how he represented himself to the defendant's company he answered: **A**

> I told defendant that we (myself, Ah Loong and Gopal) have secured the project and we owned the project.

B

[19] It is unclear from this note of evidence whether the words in parenthesis were spoken by the plaintiff to Hj Afflon or whether they were by way of explanation to the court, in evidence, of who 'we' were. We think, from his later evidence that he was the representative of Sari, that the latter is the more likely inference; that he told Hj Afflon, in effect, that Sari owned the project. **C**

[20] When asked what proposition he put to the defendant he said: **D**

> I asked $50,000 then defendant offered another $25,000 and we finally agreed on $40,000. All parties present.
>
> Agreement is defendant's company will receive payment direct from PWD and we will get our commission. Once they received the Letter of Award, we wanted the $40,000. Defendant could meet this requirement and defendant suggested instalment of $8,000 first payment and $4000 x 8 times. **E**
>
> This was agreed verbally between myself and the defendant. The money is to be divided by myself between Gopal, Ah Loong and Hj Jamil, husband of the director of Sari Comraya. His wife, Hjh Sari, director and shareholder of the company. **F**

[21] It is unclear from the plaintiff's evidence at which of the meetings this proposition was put. It seems unlikely from these notes that the manner in which the plaintiff intended to divide up the money was communicated to Hj Afflon. **G**

[22] He then said: **H**

> PWD knew that Altco Jaya would do the project.

[23] When asked how he knew that he said:

> Because PWD told us that defendant's company is a specialist. In the tender interview, I told PWD that defendant's company would be the subcontractor. The tender interview was done before the issue of the Letter of Award during the assessment process to see if the contractor is capable. We told them we will engage Altco Jaya as the specialist. This was around July or August 2004. **I**

[24] After saying in his evidence that he was the representative of Sari, he said:

> It was Sari Comraya project and I gave it to the defendant's company.
>
> What is your authority to do that?
>
> Hj Jamil came to me and gave me authority with its letter signed by his wife.
>
> Because you negotiated in your personal capacity, whatever commission defendant's company was to pay, will not go to Sari Comraya?
>
> Agree.
>
> So Sari Comraya does not get anything from the subcontract?
>
> True.

[25] It may be inferred from the plaintiff's evidence that he was saying, in effect, that:

(a) Sari would, in effect, assign the project to the defendant: 'Altco Jaya would do the project', 'defendant's company will receive payment direct from PWD';

(b) the consideration for that was a 'commission' of $40,000; but that 'commission' would not pass to Sari: 'Sari does not get anything from the subcontract';

(c) it would pass to the plaintiff (to share with the others referred to earlier): 'we will get our commission.'

[26] It is, we think, clear from the evidence already referred to, from the evidence of Mr Poon referred to below and from the tender documents that the plaintiff had, without any authority from Sari, submitted the tender to PWD in Sari's name and showing Sari's address as the personal address of the plaintiff: and that PWD had awarded the tender to Sari by its letter of 4 December 2004, addressed to Sari at that address. Mr Poon said:

> After we got the Letter of Award I found the person with case [who came?] forward and claimed he participated in the tender is not authorised by me. I don't know him at all.
>
> I discovered about him because my partner's (Hjh Sari) son told my general manager that this contract was tendered by them without my knowledge.

We looked at the value of the contract to see if it is under quoted or not. We found it was just on part [par?] ie not losing money. The profit is $50,000 for the whole project.

How did you approach Altco Jaya?

Altco went to see me and my general manager. They said they wanted to become the subcontract[or]. It was Afflon who came to see us. We discussed the subcontract and he mentioned about who interfered with the tendering. I told him that I did not authorise anyone and my local partner was a sleeping partner, a nominee.

[27] It also appears from this evidence that when Sari, that is Mr Poon, saw PWD's letter of award of that tender and examined the tender he satisfied himself that it would not lose money on it and, by his letter of acceptance dated 11 December, ratified the contract which the plaintiff had made with PWD, in the name of Sari, without authority. He was plainly entitled to do that: Contracts Act s 149.

[28] It seems hardly credible that Sari, having secured the project by making the contract with PWD would have agreed, in effect, to assign the benefit of that contract to the defendant in consideration of the payment of $40,000 to someone (the plaintiff) whom Mr Poon said he hardly knew, in circumstances in which no consideration would pass to Sari.

[29] It seems equally inconceivable that the defendant, at the meetings with the plaintiff, would have agreed to pay $40,000 except to secure the project or that it would have been within the contemplation of the parties at that meeting that, before the defendant secured the project, it might have had to pay a further sum. Moreover those possibilities were inconsistent with the plaintiff's evidence referred to above, that the effect of the contract which he was purporting to make was that Sari would receive nothing from the assignment of the project to the defendant; the payment of $40,000 to the plaintiff was to be in lieu of any payment to Sari.

[30] In reality, the plaintiff was in no position to bring about an assignment of the project to the defendant. He would not have been in a position to do that unless he had, as he claimed, Sari's authority to do so including to waive payment to it. Mr Poon's evidence was that he had no such authority.

[31] Mr Gopal, who was also at two of these meetings, said, apparently describing one of these meetings some time in September:

> Lt Col Afflon came from his office to discuss project and commission. Mr Lee, the plaintiff, asked $50,000. Lt Col Afflon said $25,000. Finally both agreed at $40,000. Lt Col Afflon said 'I am gentleman and I will pay right away'. After that everybody left.

[32] This added nothing of relevance to the plaintiff's evidence.

[33] Hj Afflon's evidence was also that there were several meetings. His evidence about them was consistent with the conclusions which we have reached about the evidence so far. He said, apparently about the first meeting:

> Plaintiff brought a yellow envelope containing tender document for the project. He said that he would like to offer the project to me because he was aware that I was very experienced and capable of undertaking this project. He raised the issue of commission. He suggested to me that if I were to take this project that commission would be $50,000. I responded immediately that I could only consider this one for a lesser amount. In the discussion, proposals and counter proposals were made. I thought that $50,000 was too expensive so I proposed to $40,000. He agreed to this counterproposal of $40,000 in principle. I also agreed in principle with a condition the details of the project, scope of work and other areas of concern should be confirmed and given to me.

[34] Hj Afflon said that the letter dated 5 July 2004 was shown to him by the plaintiff at a subsequent meeting. He said that his impression of the letter was that the plaintiff was the authorised agent of Sari. The meeting was, he said, to prove to him that the plaintiff was authorised to act for Sari.

[35] We think it is plain from the evidence which we have set out that the defendant reasonably understood that Sari, through the plaintiff, was offering, in effect, to assign the benefit of the contract to the defendant for $40,000.

[36] As already mentioned, the contract between Sari and PWD was made on 4 December 2004. The contract is set out in the letter of award of that date by the Public Works Department of the tender submitted by Sari. That letter constituted PWD's acceptance of Sari's tender. It was addressed to Sari at the residential address of the plaintiff and refers to the tender by Sari. This supports the evidence of Mr Poon, referred to earlier, that the tender was submitted by the plaintiff, without authority, on behalf of Sari.

[37] Receipt of that letter was acknowledged by Sari by a formal letter dated 11 December 2004. In fact, there were two such letters in the form provided in the acceptance letter by PWD, one signed by Mr Poon on behalf

of Sari, the other purportedly signed by the plaintiff on behalf of Sari. That signed by the plaintiff was, Mr Poon said, without authority. A

[38] Subsequently there was discussion between Hj Afflon and Mr Poon about Sari granting a 'subcontract', in effect an assignment of the project, to the defendant and on 19 April 2005 an agreement in writing between Sari and the defendant was executed. The agreement is described as a subcontract agreement. However its effect was to assign Sari's contract with PWD to the defendant in consideration of the sum of $50,000 paid by the defendant to Sari. It provided, amongst other things that the obligations of the defendant under the agreement were subject to the fulfilment of a number of conditions, in terms acceptable to the defendant, to be fulfilled by Sari. It appears that these were fulfilled because the defendant commenced performance of the work the subject of the contract with PWD and that performance was, at the date of trial, still continuing. It is of some relevance that Hj Afflon, in his evidence, described the payment of $50,000 under this contract as 'commission'. B C D

[39] The learned judge thought that the use of the term 'commission' by the parties to describe the sum of $40,000 was significant and that such a term was not appropriate to describe a payment to Sari but, more appropriately, described a payment by the defendant to the plaintiff as its agent. He said: E

> The argument that the commission was payable to the appellant's principal rather than to him as agent does not make any sense. A commission is, in the ordinary course, payable to an agent, not to principal. In the absence of evidence establishing clearly that in this particular case, the ordinary course does not apply and that it was specifically agreed that the commission was payable to the principal, such an argument should not have been accepted. In my judgment, an agreement that a principal was to receive a commission from the other party to a contract entered into between them would be highly unusual and would require clear evidence to establish this. There is no such clear evidence in this case. A commission, in the sense relevant here, is a remuneration for work or services done as an agent. The appellant was an agent and he rendered a service to the respondent by pointing the respondent in the direction of the subcontract. That he should ask for and be promised a commission for this service is perfectly normal and probable. All the witnesses speak of a 'commission' not to pay 'kickback' or some kind of rebate payable by one contracting party to the other as payment for the favour of the contract. It is totally inappropriate to speak of a 'commission' when meaning some payment such as this, rather than remuneration by one of the principals to an agent. F G H I

[40] It appears to have been primarily for this reason that the learned judge concluded that the 'commission' referred to by the parties was a payment to be made by the defendant to the plaintiff personally for bringing about a

A so-called subcontract between the defendant and Sari by which Sari would pass on to the defendant the project which it would secure under its proposed contract with PWD.

B **[41]** We agree with the learned judge that a commission, in the ordinary course, is payable by a principal to his agent. However we do not think it inappropriate to describe the payment made under the so-called subcontract between the defendant and Sari as a commission; that is, a fee of $50,000 for passing on to the defendant the project secured by Sari under its contract with PWD. Moreover, that is how it was described by Hj Afflon. Nor would C we think it inappropriate to describe a payment under a contract of a similar kind between the plaintiff and the defendant; that is a payment of $40,000 for passing on to the defendant a project expected to be secured by contract with PWD. Consequently we do not think that the use of the term 'commission' renders it unlikely that the contract purportedly entered into D between the plaintiff and defendant was intended by the parties to be of this kind.

[42] In the light of the facts which we have outlined, in our opinion the E agreement purportedly made between the parties in August or September 2004 can be understood rationally only as an agreement made on the mutual assumption that the plaintiff was Sari's agent and was making an agreement on Sari's behalf that Sari would, in effect, pass on to the defendant the benefit of the contract which was about to make with PWD in consideration of the F defendant paying $40,000 to Sari. However, because the plaintiff did not have Sari's authority to make such an agreement, it did not bind Sari and unsurprisingly, when it came to know about the purported contract, Sari did not ratify it.

G ORDERS

(a) Appeal allowed;

(b) Action in the magistrates court dismissed; and

(c) Unless, within 14 days of today, application is made to this court for H some other order, that the appellant pay the respondent its costs here and below.

Appeal allowed with costs here and below.

I Reported by Andrew Christopher Simon